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Subject Emerging Damages Claims Could Help Drive Push For Fracking Rules and Interior to
Limit Use of Categorical Exclusion In Applying NEPA to Offshore Oil, Gas Work

Emerging Damages Claims Could Help Drive Push For Fracking Rules

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Mounting public concern over possible water and air pollution from hydraulic fracturing, the controversial natural gas drilling process, is prompting new tort claims against extraction companies and could pressure the industry to seek new EPA or state regulations to help head off any potential future civil liabilities.

One informed source says that concerns over contamination from so-called fracking operations could lead to the "next frontier" of environmental tort litigation -- echoing massive nuisance cases such as those over methyl tertiary butyl ether (MTBE) water contamination filed by communities in more than a dozen states.

Some observers believe that if the threat of civil lawsuits over alleged fracking risks becomes stronger and plaintiffs file a slew of suits in varying states, it could pressure industry to try and preempt the suits, perhaps through agreeing to new federal fracking rules.

Environmentalists, state attorneys general and others have long viewed damages suits as a key tool to pressure industry to agree to new or stricter regulations -- especially in cases such as fracking where they view industry practices as unregulated or insufficiently regulated.

In the case of fracking, tort litigation "does not fill regulatory gaps. It can act as a deterrent but by no means is it a substitute for good regulation," one environmentalist says. The source says that tort suits could help to highlight what critics say is a need for stricter state and federal regulation of the process of hydraulic fracturing.

Fracking is a process where operators inject chemical-laced fluids into underground rock to release gas. The process has led to increased estimates of available gas reserves but is also prompting growing public concern about increased risk of drinking water contamination -- especially since Congress in the 2005 energy law largely exempted the practice from EPA's drinking water rules.

While environmentalists and some Democrats have sought to reinstate EPA's authority, industry has strongly resisted new regulations, saying the practice is safe and warning new rules would drive up drilling costs and gas prices. Congress in 2009 asked EPA to study what risks the practice poses to drinking water and the agency is now working to design the study.

The agency is also weighing other regulatory authorities, such as the Clean Water Act and Endangered Species Act, to address fracking concerns,

and environmentalists recently urged the agency to investigate alleged unlawful use of diesel fuel in fracking fluid. And key gas drilling states, including Pennsylvania and Wyoming, have already moved to strengthen their regulations.

But despite the nascent regulatory efforts, local citizens are increasingly concerned about contamination and other risks. A handful of citizens in Dimock Township, PA have already filed civil lawsuits against Cabot Oil & Gas Corp. seeking cleanup of contaminated wells, the creation of a medical trust fund and other damages that the citizens say stem from stray fracking gas that contaminated their water and made them ill.

As fracking operations spread through states across the country -- including non-traditional energy states like New York and Michigan -- such suits could multiply, especially as concerns grow in those states over drinking water contamination. One informed source says that as hydraulic fracturing becomes an increasingly prominent industry, the odds increase that similar tort suits will become the "next frontier of personal injury and property claims."

The source draws parallels with ongoing litigation filed by towns and communities in more than a dozen states seeking damages against the oil industry for alleged contamination of their water supplies for groundwater contamination from MTBE, the widely used petroleum additive that EPA declined to address under federal waste laws.

More Civil Fracking Suits

One industry source agrees there will be more civil fracking lawsuits in the future. Citing the Dimock lawsuit over fracking contaminating wells, the source says, "I expect that others are not far behind."

Sources say that among the most likely environmental releases from fracking operations that could provide grounds for litigation are so-called stray gas leaks that contaminate aquifers and contaminate private water wells -- as was the case in Dimock.

Other risks include toxic emissions from fracking, chemical runoff from fracking sites reaching navigable waters, and chemicals used in fracking getting into groundwater because fracking occurs thousands of feet below bedrock.

But the industry source says the latter scenarios are likely to be difficult for plaintiffs to prove. "There is absolutely no evidence in any report that the chemistry used underground in a fracking job has contaminated an underground source of drinking water," the industry source says.

And the source says runoff from fracking sites is extremely rare, adding that unpermitted surface discharges from fracking only occurs at sites that are not adequately overseeing the practice.

The source says it might be less difficult for plaintiffs to draw a connection between stray gas being disturbed by fracking and contaminated wells with high levels of the gases. "This is not the gas that companies are trying to get out," the source says, rather it is gas underground that migrates to groundwater as a side-effect of drilling.

Another possible avenue for tort litigation could be to file claims for personal injury associated with toxic emissions from equipment used for fracking, drilling and distribution, sources say, adding that this could be more likely in states such as Texas where emissions are more of a concern than drinking water contamination. The Texas Commission on Environmental Quality has recently been studying the risk of emissions from oil and gas operations in the state.

The environmentalist says it is important to scrutinize all phases of fracking operations, not just the injection of fracking fluids to break up bedrock. "I think there is the potential for tort litigation but I don't think fracking is well understood" by the public -- for example, there may be confusion over whether fracking should define just the injection of chemicals underground, or whether it should cover all operations at a fracking site.

Regardless, the source says that "industry seems to treat lawsuits as the cost of doing business and will fight everything." Only if fracking tort litigation reached the scale of MTBE suits would industry "start changing their processes" at fracking sites, the source says. Further, tort suits have downsides in that they respond to -- rather than prevent -- a harm, and litigation can also take years before there is a definitive outcome.

The source says that states "need to act more aggressively" and update and tighten their fracking regulations, adding that the Obama administration and Congress should also address fracking at the federal level.

"Industry really needs to take notice here and be a lot more preemptive and proactive" to reduce potential risks, the informed source adds. "For the oil and gas industry writ large, if they can put this type of litigation to bed it's in their interest to do so" before there is a proliferation of civil suits against fracking across the country, the source adds.

The source notes that many of the plaintiffs involved in tort litigation over MTBE contamination of water supplies are towns and communities, and that fracking tort claims in the future could similarly be driven by towns, communities and private citizens. "Does industry really want to roll the dice on a jury trial in New York where New Yorkers are extremely sensitive about their drinking water? If any of these cases went to jury trial then industry would lose," according to the source.

Even so, the informed source does not expect a massive expansion in fracking lawsuits until "something really big happens" in terms of adverse public health impacts linked to fracking.

Public Focus On Fracking Risks

In another sign of the intense public focus on the potential risks from fracking, EPA announced Aug. 10 that it postponed a planned Aug. 12 public meeting in upstate New York on its fracking study in part due to concerns that it was not able to safely accommodate an estimated 8,000 citizens who planned to attend -- more than four times the agency's original estimate.

A similar meeting July 22 outside of Pittsburgh, PA, drew nearly 1,200 people, with approximately 120 speakers weighing in on the issue. That meeting followed two others in Texas and Colorado.

But the planned meeting in Binghamton, NY, was expected to draw an even bigger crowd due to growing concerns in the state about the risks posed to the state's drinking water supply by fracking. The state Senate recently approved a temporary moratorium on new fracking permits and the state Assembly is being pressured to vote on the measure soon.

"EPA didn't have a good sense of what the public interest would be," the environmentalist says. -- *Anthony Lacey*

Interior to Limit Use of Categorical Exclusion In Applying NEPA to Offshore Oil, Gas Work

The Interior Department announced Aug. 16 that it will restrict the use of categorical exclusions—exemptions from the requirement to conduct environmental assessments under the National Environmental Policy Act—in deepwater offshore oil and natural gas activities while it reviews the use of exclusions.

The department released a memorandum saying that even after the current six-month moratorium on deepwater drilling ends, all plans submitted for approval of a deepwater drilling permit "shall be subject to an environmental assessment."

The memorandum was issued by Michael R. Bromwich, director of Interior's Bureau of Ocean Energy Management, Regulation, and Enforcement.

Environmental assessments often take a year or more to perform. The Bromwich memorandum indicates that obligation would follow the six-month moratorium.

The department stressed that the review of its National Environmental Policy Act policy would be guided in part by a White House Council on Environmental Quality review and report, also released Aug. 16, on how Interior has been applying NEPA to offshore oil and gas activity.

Interior said its NEPA policy review will be followed by announcement of "a new approach to NEPA compliance that takes into account the joint recommendations included in CEQ's report, statutory and/or regulatory constraints, and other appropriate factors."

CEQ recommended that Interior review its use of categorical exclusions in light of the risks associated with deepwater drilling, and determine whether to revise the policy. CEQ also recommended a comprehensive NEPA review of deepwater offshore activities, including site-specific reviews.

Gulf Environmental Impact Review

Interior released a statement saying that in coming days it "will publish a notice in the *Federal Register* of its intent to complete a supplemental environmental impact statement" for the Gulf of Mexico.

The department said categorical exclusions for work in shallow water—for work not involving a surface or subsea blowout preventer and a floating drilling facility—would still be available, although subject to greater scrutiny, even while the policy review is being conducted.

Interior said the use of categorical exclusions in shallow water would allow Bromwich's bureau to move forward with new permits under the requirements of the two notices to lessees and operators that were issued in June to improve safety and environmental protection. The second of those two notices, in particular, has produced a logjam of permits awaiting regulatory approvals and explanations, a problem that industry officials have attributed to unclear requirements and an unresponsive bureaucracy (150 DEN A-13, 8/6/10).

The BP Plc Macondo drilling project in the Gulf of Mexico was allowed a categorical exclusion as a part of standard policy at Interior's Minerals Management Service, now renamed the Bureau of Ocean Energy Management, Regulation, and Enforcement. That project was within an area covered by an environmental impact statement by Interior for the current five-year offshore energy plan. The project also was among the group of leases covered by an Interior environmental assessment.

On April 20, an explosion on the Deepwater Horizon floating drilling platform killed 11 men and started an oil spill that released an estimated 4.9 million barrels of crude oil into the Gulf.

Industry Concern About Slow Process

The American Petroleum Institute issued a statement Aug. 16 saying the requirement for more extensive environmental reviews "could add significantly to the department's workload, stretching the timeline for approval of important energy development projects with no clear return in environmental protection."

To Interior, the review of NEPA policy reflects “the increasing levels of complexity and risk—and the consequent potential environmental impacts—associated with deepwater drilling,” the department's announcement said.

“The NEPA review and Gulf environmental analysis are central elements of our ongoing reform of the nation's offshore energy development and regulatory program,” Bromwich said.

By Alan Kovski

The Interior Department memorandum on its temporary new policy on categorical exclusions under the National Environmental Policy Act is available at

<http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=42011> .

The White House Council on Environmental Quality review and report on offshore energy policy under the National Environmental Policy Act is available at

<http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=42036> .